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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 17 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. Not all of counsel's assertions are persuasive. Moreover, the record would have been considerably bolstered by the submission of evidence that independent researchers or those in the agricultural industry have relied on the petitioner's work, especially her work after 2001. Such evidence might have included evidence that independent research teams have cited the petitioner's articles or letters from experts independent of the petitioner who affirm the petitioner's influence on their own work. Nevertheless, other evidence, in the aggregate, is consistent with the petitioner's continuing influence in the field.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Plant Pathology from the University of California (UC), Riverside in 1993. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree.

It appears from counsel's initial cover letter that the petitioner also seeks classification as an alien of exceptional ability. This issue is moot, however, because, as stated above, the record establishes that the petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm. 1998)(hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, plant disease research, and that the proposed benefits of her work, reduced crop loss from plant diseases, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

As stated above, counsel initially asserted that the petitioner is an alien of exceptional ability. The director concluded that the petitioner's contributions and abilities have not been shown to be greater than those who meet the definition of exceptional ability at 8 C.F.R. § 204.5(k)(2). On appeal, counsel notes that the national interest waiver is available to members of the professions holding advanced degrees as well as those of exceptional ability.

Significantly, it was counsel in her initial brief who raised the issue of exceptional ability. By statute, "exceptional ability" is not, by itself sufficient cause for a national interest waiver. *Id.* at 218. Thus, the *benefit* which the alien presents to her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id; see also id.* at 222. Insofar as the director was stating that exceptional ability, by itself, does not warrant a wavier of the alien employment certification in the national interest, we concur with the director.

The petitioner submitted considerable documentation regarding the importance of the petitioner's area of research. The director did not dispute that the petitioner works in an area of intrinsic merit and, as stated above, we concur with that determination. Eligibility for the waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

Counsel has also asserted that the policies of the petitioner's employer prevent it from filing an application for an alien employment certification in the petitioner's behalf. The employer's policies and apparent disinterest in offering the petitioner a more permanent position do not bind us in this matter. The inapplicability or unavailability of an alien employment certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5.

The director expressed concern regarding the petitioner's current level of employment. It is clear that the petitioner, who has worked as a research associate since entering the United States in 2002, has been unable to maintain or even regain the same level of employment she enjoyed in Uruguay, where she worked as the Coordinator of the Biotechnology Unit at the National Institute of Agricultural Research. That said, the petitioner does not need to demonstrate the type of sustained acclaim required for classification as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A). As stated above, however, the national interest waiver contemplates a prospective benefit. Thus, the petitioner must demonstrate that she continues to influence the field to at least some degree.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra element of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The most detailed letter regarding the petitioner's work in Uruguay is from Gonzalo Arocena, former Director of the General Agricultural Services for the United Nations Food and Agricultural Organization (FAO). Mr. Arocena asserts that he led the FAO's Citrus Certification Project, whose goal was to produce virus free plants, seed and budwoods through the creation of a citrus certification program. The petitioner was "in charge of the area of Technical Development of Biological Laboratories of the Plant Protection Services." According to Mr. Arocena and a published interview of the petitioner, the FAO selected the Uruguay project as among the five best projects funded by FAO and was nominated for the Eduard Saouma Award.

The remaining letters provide only vague and poorly articulated explanations of exactly what the petitioner did in Uruguay. Nevertheless, we cannot ignore the leading roles the petitioner held in Uruguay, most notably that she served as President of the Latin American Association of Plant Pathologists. A news article explains that this position goes to a different Latin American country every two years and that the petitioner was elected to this role when it was Uruguay's turn for the presidency. In addition, the record contains the petitioner's 1997 award from the Latin American Plant Pathology Association for "outstanding contribution to Plant Pathology in Latin America," and evidence that she served as editor for at least two publications in 1998 and 2000.

a professor at UC Davis, asserts that he invited the petitioner to join his laboratory, where she currently works. He explains that she has "improved methodologies for detecting and identifying *Xylella fastidiosa* in clinical samples from plants and insects." [redacted] Director and Plant Virologist of BIOREBA AG in Switzerland, asserts that he contacted the petitioner in the context of her work on detecting *Xylella fastidiosa* and that she was "instrumental in developing tools for the detection of *Xylella* bacteria and in drafting diagnostic protocols for this pathogen."

Significantly, the record contains a July 8, 2005 letter from CAB International in Malaysia noting that the petitioner was nominated to be a member of the Expert Working Group for drafting the protocol for *Xylella fastidiosa* and inviting the petitioner to lead the group and co-ordinate the production of a draft of the protocol. The record includes the International Plant Protection Convention draft protocol credited to the petitioner and [redacted] The nomination of the petitioner to serve on the working group and the invitation for him to lead the group and produce the draft, which lists only the petitioner and one other individual as authors, is consistent with a researcher who has had at least some influence on the field as a whole.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the agricultural research community recognizes the significance of this petitioner's research rather than simply the general *area* of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the alien employment certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.